IN THE

# Supreme Court of the United States

OCTOBER TERM, 1978

## No. 78-1928

ELIZABETH B. STUART, not individually but as a co-trustee under the Last Will and Testament of Harold L. Stuart, deceased, and ILLINOIS INSTITUTE OF TECHNOLOGY, a not-for-profit corporation,

*Petitioners,*

*vs.*

CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO, a national banking association, not individually but as a co-trustee under the Last Will and Testament of Harold L. Stuart, deceased,

and

DE PAUL UNIVERSITY, et al.,

*Respondents*

**BRIEF OF RESPONDENTS DE PAUL UNIVERSITY ET AL. IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.**

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## BRIEF OF RESPONDENTS DE PAUL UNIVERSITY ET AL. IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

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This brief is filed by the following twenty Respondents:

DePaul University
University of Chicago
Northwestern University
Loyola University of Chicago
Blackburn College
The Art Institute of Chicago
Field Museum of Natural History
The Orchestral Association
Children's Memorial Hospital
Chicago Boys Clubs
Mercy Hospital and Medical Center
Michael Reese Hospital and Medical Center
Rush-Presbyterian-St. Luke's Medical Center
Lyric Opera of Chicago
YMCA of Metropolitan Chicago
The Salvation Army—Greater Chicago Unified Command
American National Red Cross
Boy Scouts of America
Rehabilitation Institute
Girl Scouts of Chicago

The foregoing Respondents constitute all but one of the defendant Charitable organizations which are affected by the matters raised in the Petition for Writ of Certiorari filed by Elizabeth B. Stuart and the Illinois Institute of Technology.

In this Brief, the following abbreviations will be used:

Stuart II—Opinion of the Supreme Court of Illinois as reported in 75 Ill. 2d 22, 387 N. E. 2d 312 (1979)

Stuart I —Opinion of the Supreme Court of Illinois as reported in 68 Ill. 2d 502, 369 N. E. 2d 1262 (1977)

IIT —Petitioner Illinois Institute of Technology

Petition —Petition for Writ of Certiorari as filed by Elizabeth B. Stuart and IIT

## OPINIONS BELOW.

Appendix A to the Petition purports to reproduce the pertinent parts of the opinion in Stuart I, but the reproduction is deficient because important portions of the opinion have been left out. The Stuart I opinion is reproduced as Appendix A hereto in its complete form.



## JURISDICTION.

Respondents *deny* that the Petition is timely with respect to the matters sought to be reviewed, and therefore Respondents submit that jurisdiction is lacking to consider the Petition.

As stated more fully in the Counter Statement of the Case and Part I of the Argument herein, review is ostensibly being sought with respect to Stuart II; however, Stuart II was simply a reaffirmation of the judgment rendered in Stuart I. Therefore, it is the Illinois Supreme Court's judgment in Stuart I which petitioners are actually attempting to bring before this Court for review on certiorari. Stuart I, however, was decided on October 5, 1977 and became final on November 23, 1977 (when a petition for rehearing, not filed by petitioners, was denied). The 90 days allowed by 28 U.S.C. § 2101(c) for filing a petition for a writ of certiorari in respect of Stuart I expired long before the filing of the Petition. Since the Petition is not timely under 28 U.S.C. § 2101(c), jurisdiction is lacking and the Petition should be summarily denied for that reason.

## STATUTES INVOLVED.

Respondents challenge the timeliness of the Petition under United States Code, Title 28, § 2101(c). This statute provides:

> Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

## QUESTIONS PRESENTED.

1. Whether a petition for certiorari is timely when it is filed more than sixteen months after the date on which a state

court judgment, which disposed of all issues in the litigation, became final but within ninety days after the entry of a second opinion by the same state court which only reaffirmed the first judgment.

2. Whether the standards set forth by the Supreme Court of the United States for determining when certiorari is appropriate are satisfied by a case which involved the construction of the will of an Illinois decedent, the effect of certain actions of the executors and trustees thereunder, the responsibility of an Illinois chancery court in administering an Illinois charitable trust, the meaning of various Illinois property law concepts, and a set of facts which is highly unlikely ever to be repeated.

## COUNTER STATEMENT OF THE CASE.

The Statement of the Case as set forth at pages 3-11 of the Petition omits many facts necessary to a proper disposition of the Petition. In particular, Petitioners' Statement of the Case does not show the procedural history of Count III.

### Genesis of Count III.

The Stuart litigation involved the construction and administration of the will of Harold L. Stuart, who died on June 30, 1966, a resident of Illinois. Stuart left the bulk of his sizable estate (around $24 million) to charity without naming any specific charities in his will. Rather, his three executors were empowered to select charitable beneficiaries over a 5-year period commencing with the date of the decedent's death.

The decedent named his two sisters and the Continental Illinois National Bank and Trust Company of Chicago (the "Bank") as his executors. These executors agreed on several charitable grants, including a grant of $5,000,000 to IIT in 1969. However, by the summer of 1970 they became deadlocked as to further charitable selections.[1] The deadlock arose out of the sisters' insistence that IIT should be given the major share of the Stuart Estate. It was the Bank's view that a plan involving a number of charities was more consistent with the decedent's intention.



On October 7, 1970, the Bank tried to break the deadlock by proposing an overall plan of distribution which included the payment of an additional $3.5 million to IIT. This proposal drew no response from the sisters and no response from IIT. Instead, on the same date, the sisters and IIT sued the Bank. Their complaint alleged that the sisters had the power to select charities whether or not the Bank was in agreement with the selections, and that the sisters had determined to give ¾ths of the Stuart Estate to IIT. Despite the filing of this lawsuit, the Bank kept its proposal open for some 7½ months. On June 15, 1971, the Bank withdrew the proposal.

It was not until December 1972 that IIT asserted any claim to the $3.5 million. At that time, the sisters and IIT filed their Second Amended Complaint in which IIT alone included a Count III asserting a vested right to the $3.5 million and any increase, gains, income or profits thereon. (See Appendix D to the Petition.) The Stuart sisters did not join in Count III.

### The Disposition of Count III in the Stuart I Litigation.

The most significant part of the Stuart I litigation concerned the issues raised under Count II of the Second Amended Complaint, in which the Stuart sisters and IIT advanced a number of theories in support of their efforts to obtain ¾ths of the

1. The deadlock occurred because of the provision in the Stuart will regarding action by a majority of the executors. The will gave the majority the power to act, but the will also provided that ". . . the corporate Trustee or Executor shall be one of such majority." Thus, when the sisters aligned themselves against the Bank, a deadlock resulted.

Estate for IIT. Their distribution scheme was rejected by the trial court in favor of a broadly-based plan of distribution proposed by the Bank. The trial court's judgment relative to Count II was affirmed by the Appellate Court of Illinois and by the Illinois Supreme Court.

The trial court also decided Count III adversely to IIT and that judgment was affirmed by the Appellate Court. However, the Illinois Supreme Court held that $3.5 million should be paid to IIT. No further amount was to be paid to IIT. This was clear from the holding itself in respect of Count III and from the judgment affirming the lower courts' holdings relative to Count II. Thus, the Supreme Court said in effect: pay $3.5 million to IIT and pay the balance of the Stuart Estate to the charities as selected under the trial court's plan of distribution.

In its briefs and oral argument in the Illinois Supreme Court, IIT asserted a right to $3.5 million *but IIT never mentioned any right to earnings.* The impression thus created was that IIT was seeking a flat $3.5 million under Count III. (Indeed, in the conclusion section to its initial brief in Stuart I, IIT did not even ask for the $3.5 million).

It was against this background that the Illinois Supreme Court discussed the Bank's proposal of an additional $3.5 million grant to IIT, and then concluded the discussion with the holding: "We hold, therefore, that upon remand an order be entered directing that an additional $3.5 million of the estate be distributed to IIT."

**Post-Judgment Proceedings.**

Following the filing of the opinion in Stuart I on October 5, 1977, a petition for a rehearing was filed by another party on a point unrelated to Count III. That petition was denied on November 23, 1977 and on December 2, 1977, the case was remanded to the Circuit Court of Cook County. Two weeks later, on December 16, 1977, disregarding their silence in the



Illinois Supreme Court on the subject of earnings, IIT and Elizabeth Stuart (the other Stuart sister having died some months earlier) filed a "petition for accounting" in the Circuit Court in which they demanded that the court hold an accounting proceeding to determine earnings on the $3.5 million and that such earnings be paid to IIT.

The Respondents herein and certain other charities filed a motion to dismiss the accounting petition in early January 1978. On January 20, 1978, Ms. Stuart and IIT filed a reply in which they, *for the first time in all of the Stuart litigation,* alleged that a federal question, in the form of a 14th Amendment due process right, was involved.

In recognition of the holding of the Illinois Supreme Court as to Count III, the trial court declined to order any accounting proceedings and the court dismissed the petition on April 20, 1978.[2] The dismissal of the accounting petition was appealed by Elizabeth Stuart and IIT on May 17, 1978. Stuart II eventually followed. In Stuart II, the Supreme Court reaffirmed its judgment in Stuart I that IIT was to receive $3.5 million and no more.

**ARGUMENT.**

Nothing in the present case warrants review by the highest Court of the land. No federal question is presented, no issue of national importance is involved, and no failure to accord due process has occurred; therefore, the petition for certiorari should be denied. Even before reaching these reasons, however, the Petition should be denied because it was not timely filed. Since the lack of timeliness of the Petition goes to the Court's jurisdiction, we will consider this point first.

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2. In an earlier order entered on December 16, 1977 and not appealed by anyone, the trial court ordered payment of $3.5 million to IIT and payment of the balance of the estate (less two reserve funds) to the charities entitled thereto under the Count II judgment. One of such reserve funds was set at $2.2 million and is still being held to cover the Stuart/IIT claim for earnings.

## I.

## THIS COURT LACKS JURISDICTION TO CONSIDER THE PETITION BECAUSE OF ITS UNTIMELY FILING.

### A. In Effect, the Petitioners Are Attempting to Obtain Review of the Stuart I Judgment.

In Stuart I, the Supreme Court of Illinois rendered two judgments relevant to the present proceedings: in connection with Count III, the Court held that $3.5 million was to be paid to IIT; and in connection with Count II, the Court affirmed the plan of the trial court, which meant that the balance of the Estate was to be paid to the charities selected under the plan.

If petitioners were dissatisfied with this resolution of the case, their obvious route to a review of Stuart I was a petition for rehearing. Had such a petition been filed, a prompt and orderly disposition of the earnings claim could have been accomplished. Instead of seeking review in this normal manner, however, petitioners withheld all of their comments on Stuart I until the case had been returned to the trial court for the entry of the mandated orders. Only then did petitioners bring out their interpretation of Stuart I in the form of a petition for an accounting proceeding to determine earnings. This oblique approach to a review of Stuart I produced only a reaffirmance of the Stuart I judgment in Stuart II. Now, petitioners are trying to obtain a review of Stuart I in this Court.

The circuitous route followed by petitioners in their efforts to obtain a modification of the Stuart I judgments is not the path to the invocation of jurisdiction in this Court. This Court has made it abundantly clear that a second opinion or decree in a case does not automatically establish a new time frame within which certiorari can be sought as to matters covered in the first opinion. As stated in *Federal Trade Commission* v. *Minneapolis-Honeywell Regulator Co.*, 344 U. S. 206, 212 (1952), "The question is whether the lower court, in its second



order, has disturbed or revised legal rights and obligations which, by its prior judgment, had been plainly and properly settled with finality."

The answer to this question in the present case is plainly in the negative. Petitioners' maneuverings in the trial court on remand and their appeal in Stuart II produced no change whatsoever in the Stuart I judgments. Stuart I thus stands as the final adjudication of all issues in the litigation. Review in this Court on certiorari was therefore obtainable, if at all, by a petition filed not later than 90 days from the date on which Stuart I became final. See *Federal Power Commission* v. *Idaho Power Co.*, 344 U. S. 17, 20 (1952):

> If the court did no more by the second judgment than to restate what it had decided by the first one, *Department of Banking* v. *Pink*, 317 U. S. 264, would apply and the 90 days would start to run from the first judgment.

See also *Federal Trade Commission* v. *Minneapolis-Honeywell Regulator Co.*, 344 U. S. 206, 211 (1952): "[T]he mere fact that a judgment previously entered has been reentered or revised in an immaterial way does not toll the time within which review must be sought."

Stuart I was decided on October 5, 1977 and a petition for rehearing (not filed by petitioners) was denied on November 23, 1977. At that point Stuart I became a final decision. Petitioners have conceded the finality of Stuart I; see the Petition, page 16, footnote 6: "It is beyond question that the October 5, 1977 decision of the Supreme Court of Illinois in Stuart I was a final decision." At the very latest, Petitioners had ninety days from November 23, 1977, to file a petition for certiorari in this Court. 28 U. S. C. § 2101(c). Under the authorities cited above, that ninety-day period was not tolled by the subsequent proceeding in the circuit court and by the appeal in Stuart II. Since the Petition has been filed more than sixteen months after the relevant deadline the Petition is not timely.

**B. Stuart II Does Not Consist of Any "Adjudication" Which Is Inconsistent with Any "Adjudication" in Stuart I.**

In an attempt to overcome the jurisdictional defect in their position, petitioners have struggled to characterize Stuart II as an "adjudication" of the Count III issues which is at variance with an "adjudication" of the same issues in Stuart I. There is no such variance. Stuart I and Stuart II are absolutely consistent. In Stuart I, the Illinois Supreme Court held that IIT was to receive $3.5 million and no more. In Stuart II, the court reaffirmed this holding.

The argument made in the petition overlooks the settled principle in Illinois that it is the holding of a case—not the opinion—which determines the rights of the parties. Thus, in *Adams* v. *Pearson,* 411 Ill. 431, 437, 104 N. E. 2d 267, 270 (1952), the Illinois Supreme Court said: "It is well settled, however, that what has been adjudicated is to be determined not from the opinion rendered but from a consideration of the judgment actually entered in reference to the issues presented for decision." And in People ex rel *William J. Scott* v. *Chicago Park District,* 66 Ill. 2d 65, 70, 360 N. E. 2d 773, 776 (1976), the Illinois Supreme Court said: "However, all of the language in an opinion does not necessarily express the actual holding by the court."

This Court has repeatedly expressed the same principle. See *Black* v. *Cutter Laboratories,* 351 U. S. 292, 297 (1956) and *Federal Communications Commission* v. *Pacifica Foundation,* 438 U. S. 726, 734 (1978): "This Court, however, reviews judgments, not statements in opinions."

**C. Summary.**

For the foregoing reasons, Respondents submit that the Petition is not timely in respect of the matters which it presents to this Court and that the Petition should be denied for lack of jurisdiction.



II.

**THIS LITIGATION INVOLVES ONLY MATTERS OF LOCAL LAW AND, THEREFORE, DOES NOT MEET THE STANDARDS GOVERNING REVIEW ON CERTIORARI.**

Even if petitioners had filed a timely petition for certiorari with respect to Stuart I, the Petition does not present facts which satisfy the standards for granting review on certiorari.

This litigation involved the construction of the will of an Illinois decedent and the effect of certain actions of the executors and trustees thereunder, the responsibility of an Illinois chancery court in administering an Illinois charitable trust when the trustees are deadlocked, and the meaning of various Illinois property law concepts. All of these matters are purely local in nature. While this case is of importance to the litigants, it is not important to anyone else and the facts are so unusual that it is highly unlikely that any similar case will arise in the future. Thus, there are no "special and important reasons" for granting certiorari herein. See Rule 19, paragraph 1 of the Rules of the Supreme Court. This Court has said that it does not act for the benefit of particular litigants and that the term "special and important reasons" implies a reach to a problem beyond the academic and episodic. See e. g., *Rice* v. *Sioux City Memorial Park Cemetery, Inc.,* 349 U. S. 70, 74 (1955). A practical example of the application of these standards is found in *Black* v. *Cutter Laboratories,* 351 U. S. 292 (1956), where a writ of certiorari was dismissed when the court concluded that ". . . the decision involves only California's construction of a local contract under local law, and therefore no substantial federal question is presented."

The present case involves only Illinois' construction of the will of a local decedent under local law. No federal question is presented and there is no reason why certiorari should be granted.

## III.

**THE PETITIONERS' TACTICS IN THE COURTS BELOW SHOULD BAR THEM FROM ANY FURTHER REVIEW IN THIS COURT.**

In addition to the objections to a grant of certiorari as set forth under Points I and II herein, the positions and tactics adopted by petitioners in the courts below make any review of the Stuart case by this Court completely unwarranted.

The Petition is necessarily founded on the proceedings which culminated in Stuart I. The principal issue in those proceedings was always petitioners' claim that three-quarters of the Stuart Estate should go to IIT. That claim was tried and appealed in the context of Count II of the Second Amended Complaint. Count III was obviously a back-stop alternative to Count II. Indeed, as previously noted, the Stuart sisters did not even join in Count III.

In the Illinois Supreme Court in Stuart I, IIT said not one word in either its initial brief or its reply brief about earnings and earnings were never mentioned in the course of IIT's oral argument.[3] The Illinois Supreme Court was thus not even made aware of any claim by IIT for earnings and the Court's holding as to Count III, which awarded to IIT the specific sum of $3.5 million, was fully responsive to IIT's argument as presented to the Court.

Petitioners have belatedly sought to make IIT's earnings claim a part of IIT's presentation in the Illinois Supreme Court by arguing that the claim was included in Count III of the Second Amended Complaint. (Petition, p. 13) The Second Amended Complaint was included as part of a 940-page abstract of record. It is unthinkable that a reviewing court should be deemed to have examined and decided material presented only through

3. Since the Stuart sisters were not parties to Count III, their presentation in the Illinois Supreme Court did not touch upon Count III at all.



the abstract of record and not raised in briefs or in oral argument. The well-understood rule in Illinois is that it is not the duty of a reviewing court to search the record to determine the issues, or to seek material for the disposition of such issues. *Biggs* v. *Spader*. 411 Ill. 42, 44, 103 N. E. 2d 104, 106 (1951), cert. den. 343 U. S. 956; *47th & State Currency Exchange Inc.* v. *B. Coleman Corporation,* 56 Ill. App. 3d 229, 232, 371 N. E. 2d 294, 297 (1977).

If IIT had problems reconciling the Illinois Supreme Court's holding with respect to Count III with that Count as set forth in the Second Amended Complant, IIT had an appropriate form of recourse: a petition for rehearing filed within the requisite time period following the entry of the Stuart I opinion. However, IIT did not file any such petition for rehearing. Instead, IIT waited until the case was back in the trial court on remand; at that point, IIT, together with Elizabeth Stuart, asked the trial court to conduct new proceedings and to enter orders which clearly went beyond the scope of the directions given to the trial court by the Illinois Supreme Court. The trial court denied these requests, and properly so in the light of the Illinois Supreme Court's specific holdings and directions.

In view of the foregoing record, it is difficult to see how in Stuart II the Illinois Supreme court could come to any conclusion other than that Stuart I should be reaffirmed.[4]

Moreover, the foregoing record should be seen in the overall context of the Stuart Estate following Stuart I. Although not named in the Stuart will, IIT had emerged with $8.5 million in distributions from the estate, a figure more than six times the amount received by any other charity. IIT had also received

4. The record makes the res judicata argument which is set forth at length in the Petition very difficult to comprehend. If the res judicata doctrine has any relevance in this case, it cuts against the petitioners. In Stuart I, the earnings claim was decided against IIT. Under the doctrine of res judicata, IIT should not be permitted to relitigate the claim. Having managed to get back to the Illinois Supreme Court despite the doctrine, it hardly follows that the doctrine required the court to come up with a different result.

some $350,000 from a life trust established for Harriet Stuart, then deceased. IIT had (and still has) a remainder interest in a life trust for Elizabeth Stuart. Obviously, IIT had fared extremely well in the administration of the estate.

Of the $8.5 million received by IIT from the Stuart Estate, $3.5 million has been paid to IIT under the very holding which petitioners are now criticizing in the Petition. Meanwhile, over $2.2 million, which should have been distributed in late 1977 to the Respondents and the Chicago Historical Society in accordance with Stuart I, has languished in a reserve while petitioners have pressed their newest theories in the trial court on remand from Stuart I, then in a second appeal to the Illinois Supreme Court, and now in this Court.

The Petition, which is only an attempt to enlarge IIT's participation in the Stuart Estate to an even greater degree, furnishes no basis for review by this Court, whether on some theory of constitutional law or on any other theory. IIT has had more than ample opportunities to present its earnings claim. Whenever the claim has been presented, it has been rejected. Petitioners have been accorded full due process by the courts of Illinois and they now stand as unsuccessful litigants and nothing more. There is simply no reason why the time of this Court should be taken up with the Count III earnings issue in the estate of an Illinois resident who died more than thirteen years ago.

## CONCLUSION.

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully Submitted,

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# APPENDIX A.

IN THE SUPREME COURT OF ILLINOIS

| | |
|---|---|
| ELIZABETH B. STUART, not individually, but as a co-trustee under the Last Will and Testament of Harold L. Stuart, deceased, and ILLINOIS INSTITUTE OF TECHNOLOGY, a not-for-profit corporation,<br>*Plaintiffs-Appellants,*<br>*vs.*<br>CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO, a national banking association, not individually, but as a co-trustee under the Last Will and Testament of Harold L. Stuart, deceased.<br>*Defendant-Appellee,*<br>CHICAGO HISTORICAL SOCIETY, ET AL.,<br>*Intervenors, Defendants-Appellees.* | Appeal from the Appellate Court for the First District; heard in that court on appeal from the Circuit Court of Cook County,<br><br>The Honorable Francis T. Delaney, Judge, presiding. |

OPINION FILED OCTOBER 5, 1977—REHEARING DENIED NOVEMBER 23, 1977

(Nos. 49070, 49074 cons.-Affirmed in part and reversed in part and remanded.)

ELIZABETH B. STUART ET. AL., *Appellants, vs.* CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO ET. AL., *Appellees.*

Opinion filed Oct. 5, 1977.—Rehearing denied Nov. 23, 1977.

MR. JUSTICE RYAN delivered the opinion of the court:

This appeal involves a dispute between a corporate co-trustee and two individual co-trustees concerning the disposition of a

large charitable trust fund created by the will of Harold L. Stuart. The individual co-trustees, the sisters of the late Harold L. Stuart (hereinafter referred to as the Stuart sisters), brought the original complaint together with a co-plaintiff, the Illinois Institute of Technolgoy (hereinafter referred to as IIT), against the corporate co-trustee, the Continental Illinois National Bank and Trust Company (hereinafter referred to as the Continental Bank). The dispute arose because the individual co-trustees and the corporate trustee were unable to agree upon a plan of distribution. Additionally, 27 charitable organizations, which were named in the plans of distribution submitted by the co-trustees, were granted leave to intervene in the lower court. The circuit court of Cook County essentially adopted the plan of distribution submitted by the corporate co-trustee in preference to the scheme of distribution advanced by the individual co-trustees. The circuit court's judgment was affirmed in all respects by the appellate court. (*Northern Trust Co.* v. *Continental Illinois National Bank & Trust Co.* (1976), 43 Ill. App. 3d 169.) We granted leave to appeal pursuant to our Rule 315(a) (58 Ill. 2d R. 315(a)) and now affirm the decision of the appellate court in part, and reverse that decision in part.

The facts involved in the present appeal are lengthy and complex. A full statement of the facts is included in the opinion of the appellate court, and we shall set out only those facts necessary for an understanding of our disposition of this case.

Harold L. Stuart died on June 30, 1966. He was unmarried and was survived by his two unmarried sisters. He was a renowned financier and investment banker and was the president and sole stockholder of the investment banking firm of Halsey, Stuart and Co., Inc., All parties agree that Harold Stuart was devoted to the city of Chicago, and that his lifelong desire was to build the city into a financial center. The testator left a multimillion dollar estate which presently is valued in excess of $26 million.



Harold Stuart's will was executed on April 23, 1964. It named the Continental Bank and his two sisters as co-executors and co-trustees. The will provided for the creation of two $1 million trust funds to provide life estates for each sister with the remainders to charity. The remainder of his estate was to be distributed to qualified charitable organizations. The will did not mention specific charities, but rather vested the discretion to select charitable beneficiaries in the co-trustees. Under the will, the trustees were to select these charities within 5 years of the testator's death.

The testator's will was solicited for the Continental Bank by David M. Kennedy, who was then the chairman of the board of the bank. Kennedy recommended a senior partner of the law firm which represented the bank to draft the will, and the testator had this attorney prepare the will. Kennedy testified that he spoke with the attorney while the will was being drafted and asked that co-executors and co-trustees be named in addition to the Continental Bank. The testator was 82 years of age at the time the will was drafted, and shared a home with his two sisters in Chicago.

The trial court heard conflicting testimony concerning the testator's intentions from the time the will was executed until his death. This testimony is more fully recounted in the appellate court's opinion than shall be set forth here. In essence, however, the testimony of several bank officers was that the testator had no specific plan of distribution in mind and that he had expressed the desire that the bank be primarily responsible for the selection of the particular charities to take from his estate. The testimony of co-trustee Elizabeth Stuart was to the contrary. She testified that the testator frequently discussed his will with her and her sister, and told them that in the event of a disagreement between the two sisters the bank would cast the deciding vote. Elizabeth Stuart further testified that the testator had orally apprised her and her sister of the charities to which gifts should be made. She stated that the testator had determined that

three-quarters of his estate should be donated to IIT to construct and endow a school of finance and management. The other individual co-trustee, Harriet Stuart, did not testify at the trial.

The Continental Bank and the Stuart sisters qualified as co-executors on August 29, 1966. The testimony of the bank officer responsible for the administration of the estate indicated that the bank was inundated with requests from charitable organizations once the provisions of the will became publicly known. Approximately seven months after the testator's death, Harriet Stuart contacted IIT to receive information concerning its programs. She later requested and received additional information that her brother had attended Lewis Institute for five semesters between 1896 and 1900. Lewis Institute merged with Armour Institute in 1940 to form IIT. In May of 1968, Harriet Stuart contacted IIT and informed officials there that she and her sister desired to make a substantial grant to the institution. She requested a proposal concerning the possibility of establishing a school of management and finance. IIT prepared such a proposal and submitted it to the sisters. The proposal originally requested $7.5 million to fund the school, but this figure was subsequently raised to $8.5 million.

On October 10, 1968, the Stuart sisters filed a "Statement of Intent" with the bank in which they formally directed that IIT receive $8.5 million to establish the Harold Leonard Stuart School of Management and Finance. The officials at the Continental Bank considered the amount of this grant inappropriate. After meeting with representatives of IIT, the bank agreed to a reduced proposal in the amount of $5 million on April 3, 1969, and this amount was subsequently disbursed to IIT. The Continental Bank and the sisters also were able to reach agreement concerning grants to the Society of Cincinnati and the Kenilworth Historical Society. The gifts to each organization were sponsored by the Stuart sisters and not the bank. Elizabeth Stuart testified that the testator had instructed her and her sister that these organizations should take under the will. A distribu-



tion of $250,000 was also made to the Chicago Foundation for Cultural Development on January 26, 1968. This distribution was made with the prior understanding that the money would be transferred to the New Chicago Foundation. As the propriety of this distribution is a central issue in this appeal, we shall set forth the salient facts surrounding the transaction in our discussion of that issue.

In the circuit court, a great deal of testimony was heard concerning the conduct of the co-trustees during the time following the testator's death until the institution of the lawsuit on October 7, 1970. Essentially, the evidence showed that the Stuart sisters and the Continental Bank were never in complete agreement as to either the identities of the charitable beneficiaries or the manner in which they would be selected. The bank was from the outset interested in distributing the estate to a large number of charities and preferred to develop a total plan for distribution. The Stuart sisters, on the other hand, were interested only in considering those charities which they asserted to have been the choices of their brother. The sisters also preferred to consider bequests to only one charity at a time. The sisters also declined to attend personal meetings with bank representatives, and, generally, did not feel that the bank should have any significant voice in the selection process.

This was the approximate state of affairs on October 7, 1970, when the Stuart sisters and IIT filed suit. The complaint requested a judgment providing for an additional grant to IIT to the extent of three-fourths of the estate, and also sought entry of a judgment providing that all further disputes between co-trustees should be resolved by the decision of the individual co-trustees. On this same date, the Continental Bank proposed a revised plan of distribution in a letter to the Stuart sisters. Under the plan, grants were to be made to a number of charities and an additional $3.5 million was designated for IIT.

It its answer to the complaint, the bank set forth its total plan of distribution and requested that the trust be distributed in that

manner. The answer also stated that the disagreement between the co-trustees was that the bank proposed a total gift of $8.5 million to IIT, whereas the Stuart sisters wanted that institution to receive three-quarters of the estate.

On June 15, 1971, the bank, by letter to the Stuart sisters, made its final proposal. This proposal adhered to the selections of charitable beneficiaries contained in the letter of October 7, 1970, with the exception that the bank no longer proposed an additional gift to IIT. The letter stated that agreement had been reached on four proposals: $5 million to IIT; $600,000 to the Kenilworth Historical Society; $550,000 to the Society of Cincinnati; and $250,000 to the Chicago Foundation for Cultural Development. The bank then proposed that the remaining funds be distributed in the following manner:

"1. Make specific dollar commitments to the following institutions:

| | |
|---|---|
| a. The University of Chicago | $1,000,000 |
| b. Northwestern University | 1,000,000 |
| c. Loyola University of Chicago | 1,000,000 |
| d. DePaul University | 1,000,000 |
| e. Chicago Historical Society | 500,000 |
| f. Blackburn College | 300,000 |
| g. The Art Institute of Chicago | 1,000,000 |
| h. Chicago Symphony Orchestra | 1,000,000 |
| i. Field Museum of Natural History | 1,000,000 |
| j. Mercy Hospital | 250,000 |
| k. Michael Reese Hospital | 250,000 |
| l. Presbyterian-St. Luke's Hospital | 250,000 |
| m. Children's Memorial Hospital | 250,000 |



2. Make fractional share commitments to the following institutions each to receive the dollar amount indicated or 1/9th of the remainder of the Trust (i.e., excluding specific dollar amount gifts), whichever is smaller, when such remainder is finally determined:

| | |
|---|---|
| a. Lyric Opera | $200,000 |
| b. Union League Foundation for Boys Clubs | 150,000 |
| c. Chicago Boys Club | 100,000 |
| d. Central YMCA Community College and High School | 100,000 |
| e. The Salvation Army-Chicago Chapter | 100,000 |
| f. The American Red Cross-Chicago Chapter | 100,000 |
| g. The Boy Scouts of America-Chicago Chapter | 50,000 |
| h. The Girl Scouts of America-Chicago Chapter | 50,000 |
| i. The Rehabilitation Institute of Chicago | 25,000 |

3. Any amount remaining after these gifts will be allocated in equal shares among the following:

Museum of Science and Industry
Chicago Educational TV
Lake Forest College
Berea College
Union College
Rockford College

provided, however, that if the amount remaining to be allocated to this group number 3 shall exceed $300,000, each of this group shall receive $50,000 and the residual amount shall be allocated among the institutions listed in groups numbers 1 and 2 on a proportionate basis. (Each institution listed in groups numbers 1 and 2 shall receive that part of the amount in excess of $300,000 as bears the same proportion to such excess amount as does the dollar amount specified for that institution under the terms of group number 1 or 2 bears to the total dollar amount specified for all the institutions under groups numbers 1 and 2.)"

The bank incorporated this plan into its amended answer of June 22, 1971.

The Stuart sisters responded to this proposal in a letter dated June 22, 1971. In the letter, the sisters specifically denied that they had approved a gift to the Chicago Foundation for Cultural Development, and stated that they did not even have knowledge of the gift until it was disclosed in the bank's pleadings. The sisters acknowledged their agreement to the other three completed gifts listed in the bank's letter and then set forth their plan for final distribution:

> "Accordingly, our definitive plan for the distribution of the remainder of the Harold L. Stuart Estate is to make immediate specific dollar commitments as follows:
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> | | |
> |---|---|
> | Illinois Institute of Technology | $4,000,000 |
> | Art Institute of Chicago | 5,000,000 |
> | Kenilworth Historical Society | 30,000 |
>
> The gift of $5,000,000 to the Art Institute, hwever, is to be reduced (but not below $2,500,000) to the extent necessary to give Illinois Institute of Technology at least 75% of the total amount of the estate passing to all charities, disregarding for this purpose what Illinois Institute may receive from the trusts created for us under our brother's will.
>
> If any funds remain after making the foregoing distributions, they are to be given to Illinois Institute of Technology to provide additional endowment for the Harold Leonard Stuart School of Management and Finance.
>
> We also hereby specify the distribution to be made of the remainder interests in the trusts created for us under our brother's will. If the funds remaining in the trust of the one first to die equal or exceed $500,000, a grant of that amount shall be made to the Chicago Historical Society; if the funds remaining in the other trust at the death of the survivor equal or exceed $500,000, a grant of that amount shall be made to the Newberry Library; and, subject to such conditional grants, the remainder interest in each of our trusts shall go to Illinois Institute of Technology to increase the endowment of the Stuart School."



On June 29, 1971, the Stuart sisters and IIT filed an amended complaint. A second amended complaint which contained four counts was later filed. Count I was brought by the sisters and alleged that the bank had breached the trust provisions of the will by reason of its payment of $250,000 to the New Chicago Foundation. Count II was brought by both the sisters and IIT. Count II requested that the estate be distributed in accordance with the plan contained in the sisters' letter of June 22, 1971, and requested that all future disputes be resolved by the decision of the two family trustees. Count III was brought by IIT alone and sought a declaration that IIT had a vested interest in an additional grant of $3.5 million. Count IV was also brought by IIT alone and sought a declaration that IIT had a vested interest in the remainders of the personal trusts to be enjoyed after the termination of the sisters' life estates.

On September 15, 1971, the plaintiffs filed a motion for judgment on the pleadings on the basis of an interpretation of Article Seventh of the will. This motion was denied. Subsequently, 27 charities which were named in the various proposals were granted leave to intervene.

The circuit court entered judgment on November 15, 1974, after a trial without a jury. The trial court held for the bank as to the first three counts of the complaint. The court found the gift to the Chicago Foundation for Cultural Development to be proper although the court also found that the gift had not been approved by the Stuart sisters. The circuit court also approved and adopted the entire distribution plan proposed by the bank. In regard to count III, the court found that IIT had no right to an additional grant of $3.5 million. The circuit court did, however, find for IIT on count IV and directed that the remainder interests in the personal trusts of the sisters be distributed in accordance with the sisters' wishes upon termination of the life estates. The plaintiffs appealed the rulings as to the first three counts, and the appellate court affirmed the lower court's decision in all respects. Harriet Stuart died while this

cause was pending before the appellate court. The Northern Trust Company, as executor of her estate, appears before this court as cross-appellee to respond to the cross-appeal of De Paul University *et al.* challenging the sisters' right to fees and expenses as executors and trustees.

In rendering its judgment, the circuit court did not purport to be establishing its own scheme of distribution. Rather, the court made it clear that it was accepting the bank's plan in total with the exception of its ruling as to count IV. The appellate court also considered the issue facing the trial court to be which of two competing plans to adopt. (43 Ill. App. 3d 169, 197.) While this case was pending in the appellate court, the Stuart estate received approximately $4.5 million as a result of certain Federal estate tax litigation. The trial court had been informed that the parties expected an additional $3.5 million to be available as a result of this litigation. At present, the amount of distributable funds exceeds the $9.75 million aggregate of the specific dollar commitments in the bank's plan, which was approved by the circuit court, by more than $6.5 million. Under the lower court's rulings, this money will be distributed on a *pro rata* basis to the charities which comprise groups 1 and 2 of the bank's plan which we have previously quoted. Under the bank's plan, IIT and the group 3 charities are precluded from sharing in the additional $6.5 million. Additionally, under the circuit court's ruling it appears that the Chicago Historical Society will receive $1 million although the bank and the Stuart sisters designated that charity for no more than a $500,000 grant.

A number of issues, and subissues, have been raised by the various parties to this appeal. The Stuart sisters and IIT contend that the payment of $250,000 to the Chicago Foundation for Cultural Development constituted a breach of trust on the part of the bank and argue that severe sanctions should be applied to the bank. Plaintiffs, IIT and the Stuart sisters, and an intervenor, the Art Institute of Chicago, also advance several



contentions relating to the construction of Harold Stuart's will which, if accepted, would mandate reversal of the circuit court's judgment and adoption of the distribution plan proposed by the sisters. Alternatively, IIT and the Stuart sisters contend that the circuit court's adoption of the bank's scheme of distribution was erroneous. Plaintiff IIT contends, in the alternative, that it has a vested interest in an additional $3.5 million of the estate. Plaintiffs also challenge the amount of the grant which will be received by the Chicago Historical Society under the circuit court's decision.

Finally, a number of the charitable intervenors cross-appeal from the circuit court's order approving a grant of fees to attorneys for the plaintiffs. And, the Museum of Science and Industry, an intervenor, cross-appeals from the circuit court's ruling which limits the museum to a grant of $50,000.

The first issue to be considered is whether the bank breached its duty as a trustee by unilaterally distributing $250,000 to the Chicago Foundation for Cultural Development. This grant was made to the above organization with the prior understanding that the money would be passed on to the New Chicago Foundation. The circuit court found that the Stuart sisters had not assented to this gift and that they would not have agreed to it, but nonetheless found the gift to be "proper."

The New Chicago Foundation published Chicago Magazine. The Chicago Foundation for Cultural Development and the New Chicago Foundation were suborganizations of the Mayor's Committee for Economic and Cultural Development of Chicago. Kennedy, the then chairman of the board and chief executive officer of the Continental Bank, had been active in the creation of the Mayor's Committee in 1961. He was on the executive board of the Mayor's Committee and was a founding director of the New Chicago Foundation. Another bank official served as president of the New Chicago Foundation and as an officer of the Foundation for Cultural Development. As mentioned, it is uncontroverted that the $250,000 grant was made to

the Foundation for Cultural Development with the prior understanding that the money would be transferred to the New Chicago Foundation to be used for the publication of Chicago Magazine. The magazine was a project of the Mayor's Committee and was intended to create a favorable impression of Chicago by publishing articles about the city.

Harold Stuart's will provided that distributions were to be made to "qualified charitable organizations." In Article Fourth of the will that term was defined in part as "qualified exempt organizations for the purposes of Sections 170(c), 501(c)(3) and 2055 and other related provisions of the Internal Revenue Code in effect at the time of my death." The New Chicago Foundation was not qualified as an exempt organization under section 501(c)(3).

Kennedy testified that he had spoken to Harriet Stuart and proposed a gift to the New Chicago Foundation. He further testified that Harriet Stuart did not expressly concur in the proposal. Kennedy described Harriet Stuart's reaction to the proposal as follows: "And I had no reaction to that, good, bad or indifferent. I didn't have any yes, no, I don't know, on it. It was just a statement by me." Elizabeth Stuart testified that she was unaware of the distribution until three years after it was made, and the bank admitted that prior to October 7, 1970, no document was sent to the Stuart sisters which mentioned either the Mayor's Committee, the Foundation for Cultural Development or the New Chicago Foundation.

On January 16, 1968, Kennedy directed the bank's trust department to transfer $250,000 from the Stuart trust to the account the New Chicago Foundation kept with the bank. He also requested that written authorizations be prepared for the Stuart sisters' signatures. The authorizations were prepared but were never sent to the family trustees. When it was learned that the New Chicago Foundation was not a qualified organization under section 501(c)(3), Kennedy directed that the disbursement be made through the Foundation for Cultural Development which was so qualified, and the $250,000 was transferred in this manner. The funds were used to support the now-defunct Chicago Magazine.



In September of 1969, it became necesary to establish a charitable trust. Prior to this time, the bank had hoped that distributions to charity could be made directly from the Stuart estate, but the pending Federal tax litigation made that plan impractical. In the second current account of the probate estate, the bank listed the $250,000 disbursement of January 26, 1968, as a partial disbursement from the estate to the Harold L. Stuart charitable trust. No mention was made of the New Chicago Foundation or of the Foundation for Cultural Development in either the probate account or in the account receipt presented to, and signed by, the individual trustees.

The Stuart sisters contend that the bank violated its duty as a trustee by disbursing $250,000 without obtaining the approval of the individual trustees, and by transferring that amount to an organization that was not qualified to take under the will. We agree that the bank's conduct in relation to the gift to the New Chicago Foundation constitutes a breach of trust.

The bank does not argue that it had authority under the Stuart will to make disbursements without the concurrence of at least one of the family trustees while both of the sisters were living. Though several interpretations of the will are advanced by the various parties, no party contends, nor could it reasonably be argued, that the bank had the unilateral authority to make disbursements at the time the gift was given to the New Chicago Foundation. The bank, however, now asserts that the circuit court had the authority to retroactively approve the bank's actions. The bank seemingly argues that since the court could have approved of this gift if a *bona fide* deadlock existed under the will, then it does not matter that there was no deadlock at the time the funds were distributed. We find this line of reasoning to be without merit.

It is axiomatic that the limits of a trustee's powers are determined by the instrument which creates the trust (Restatement (Second) of Trusts sec. 164 (1959); *McGookey* v. *Winter* (1943), 381 Ill. 516, 524), and that a co-trustee cannot exercise a joint power individually (Restatement (Second) of Trusts secs. 194, 383 (1959); 90 C. J. S. *Trusts* sec. 258 (1955); *Maton Bros., Inc.* v. *Central Illinois Public Service Co.* (1934), 356 Ill. 584; *Dingman* v. *Boyle* (1918), 285 Ill. 144, 148).

In *Chicago Title & Trust Co.* v. *Chief Wash Co.* (1938), 368 Ill. 146, 155, this court defined the term "breach of trust":

> "The term 'breach of trust' is sufficiently comprehensive to include every violation by a trustee of a duty which equity lays upon him, whether willful and fraudulent, or done through negligence, or arising through mere oversight or forgetfulness. Included is every omission or commission which violates in any manner the three major obligations of carrying out a trust according to its terms, of care and diligence in protecting and investing the trust property, and of using perfect good faith."

Under this definition, the bank's exercise of unauthorized distributive power clearly constituted a breach of its duty to carry out the trust according to its terms.

The bank's conduct reveals that it was aware that it had no authority to unilaterally make the gift in question. Written authorization was prepared for the sisters' signatures, but was never sent to them. Also, Kennedy's testimony revealed that he knew he did not have the express approval of the Stuart sisters, and no explanation is offered for the failure of the bank to obtain such assent before releasing the $250,000.

In addition, there is a second independent ground upon which to predicate a holding that the bank breached its duty as trustee. The will of Harold Stuart specifically required that grants be made only to charitable organizations which qualified for an exemption under section 501(c)(3) of the Internal



Revenue Code. The New Chicago Foundation was not so qualified, and the bank was well aware of this as evidenced by the circuitous manner in which it transferred the funds to that foundation. The authorization which had been prepared for the sisters' signatures specified the New Chicago Foundation as the donee and not the conduit through which the money ultimately passed.

The circuit court had no authority to approve the grant under the circumstances of this case. We are aware of no authority which would authorize a court of equity to condone an unauthorized distribution to an unqualified beneficiary absent exceptional and unusual circumstances. As precedent for its position the bank relies almost exclusively upon *Warner* v. *Rogers* (1929), 255 Ill. App. 78. In *Warner,* the testator left an estate composed of large holdings of farmland. The will created a trust whereby the beneficiaries of the life estate, testator's grandchildren, were also the trustees. In their capacity as beneficiaries, the trustees entered into an agreement naming one of their number as managing trustee. Under the agreement, the approval of the other trustees was necessary in order to make repairs and improvements except those of a small temporary and urgent nature. The managing trustee made numerous repairs which were not agreed to by one of the trustees. This trustee's consent could not be obtained because she was living abroad during the time in question. The court found that most of the repairs made were "small and urgent," and further found that the larger repairs were "urgent and necessary to the preservation of the [property]." (255 Ill. App. 78, 87.) The appellate court noted that the managing trustee should have sought leave of court to make the few large repairs and stated that the circuit court would have granted approval had he done so. The appellate court then held that "under the facts as they specifically appear in this particular case, we do not believe that in equity and good conscience appellee should be penalized for not having done so." 255 Ill. App. 78, 89.

We hardly consider *Warner* to be support for the position which the bank advances. As the above quote demonstrates, the decision was expressly limited to the particular facts involved. Moreover, there are no exceptional circumstances involved here which would justify the bank's failure to follow the clear terms of the will. There was no urgent need for making this gift, and no issue of preserving trust assets is involved. The bank knew it had no authority to act without the concurrence of one of the sisters, and it further knew that the intended beneficiary was not qualified to take under the express terms of the will. The breach of duty in the present case is clear, and we cannot condone it. We hold that the bank breached its duty as a trustee by giving $250,000 to the New Chicago Foundation through the chosen conduit organization, and that the circuit court erred in retroactively approving said gift.

The Stuart sisters maintain that the proper remedy for the bank's breach of trust is to require repayment of the gift, to disqualify the bank from acting further as a trustee, and to disqualify it from participating in the selection of charitable beneficiaries.

We agree that the bank must restore the amount which was improperly released from the estate. A trustee is personally liable for any loss occasioned by a violation of his duties as trustee. (Restatement (Second) of Trusts sec. 226 (1959); *Piff* v. *Beresheim* (1950), 405 Ill. 617, 3 A. Scott, Trusts sec. 205 (1967); 4 A. Scott, Trusts sec. 386 (1967).) This rule applies where the violation is a result of negligence or mere oversight as well as when the trustee is wrongfully motivated. (*Chicago Title & Trust Co.* v. *Chief Wash Co.* (1938), 368 Ill. 146; see generally 3 A. Scott, Trusts sec. 201 (1967).) Here, the unauthorized and unilateral payment to an unqualified beneficiary reduced the value of the estate by $250,000, and the bank, on remand, will be required to return this sum to the estate together with interest computed from the date of the gift.



We do not, however, determine that the bank should be removed as a trustee or disqualified from participating in the selection of charitable beneficiaries. The Stuart sisters contend that such an additional sanction is necessary as a deterrent and as punishment for the bank's breach of trust. The sisters characterize the bank's conduct as self-dealing and assert that the bank succumbed to a conflict of interest. In our view, the record does not conclusively establish a basis for such a contention. Nor are we unmindful of the fact that disqualification of the bank would in reality be a punishment of the intervening charities which are listed as beneficiaries in the bank's plan of distribution. We, therefore, determine that no additional sanctions are warranted under the facts of the instant case.

We turn next to the issues raised concerning the interpretation of the will of Harold Stuart. In several places in the first six articles of the will the testator directed gifts to charity. In each instance the testator merely directed that the gift be paid to "such qualified charitable organizations as may be selected by my Executors," or used a similar expression which carried the same meaning. The dispute involved in the instant appeal concerns the provisions of Article Seventh of the will. Article Seventh contains a number of what may be termed standard provisions relating to the powers of the trustees and the administration of the estate. Article Seventh, however, also includes the following provision.

> "A majority of the Trustees or of the Executors, as the case may be, may take any action hereunder with the same force and effect as though all the Trustees or Executors had joined therein, *provided that the corporate Trustee or corporate Executor shall be one of such majority*. If at any time there shall be only one individual Trustee or Executor surviving, then in the event of any disagreement between the two Trustees or Executors, the determination of the corporate Trustee or corporate Executor shall control." (Emphasis added.)

The circuit court and the appellate court both found that this provision required the concurrence of the bank in the selection

of any charitable beneficiaries. The Stuart sisters, IIT and the Art Institute, an intervenor, all contend that the above-quoted provision does not preclude the application of majority rule to the selection of charitable beneficiaries by the three trustees.

Plaintiffs challenge the circuit and appellate courts' interpretation of Article Seventh on several grounds. The Art Institute contends that the provision was not intended to apply to distributive powers, but rather was limited in application to the administrative duties of the trustees. IIT and the Stuart sisters contend that the provision should be read as a directive to the bank to act as a tie-breaker whenever the individual co-trustees are in disagreement. It is also contended that if the provision is interpreted as allowing a deadlock, majority rule should still apply because the will fails to provide a mechanism for breaking that deadlock.

At common law a majority of the trustees of a charitable trust were competent to exercise the powers conferred upon them, unless the terms of the trust provided otherwise. (Restatement (Second) of Trusts sec. 383 (1959).) This rule was extended by statute to private trusts as well. The applicable statute provided that in cases of multiple trustees, "a majority of the trustees shall be competent to act in all cases, * * * *unless the instrument of authority creating the trust shall otherwise provide.*" (Emphasis added.) (Ill. Rev. Stat. 1963, ch. 148, par. 33.) The basic issue to be determined in regard to all the will interpretation arguments raised by plaintiffs is whether the provisions of Article Seventh preclude the application of "majority rule."

The duty of a court in construing a will is to determine the intention of the testator. (*Feder* v. *Luster* (1973), 54 Ill. 2d 6.) The intent is to be ascertained by viewing the will as a whole and by giving to the words used their plain and ordinary meanings. (*Helms* v. *Darmstatter* (1966), 34 Ill. 2d 295; *In re Estate of Breault* (1963), 29 Ill. 2d 165.) If the testator's intention



can be gathered from the language of the will, no resort will be made to technical rules of presumed intention. (*Storkan* v. *Ziska* (1950), 406 Ill. 259.) We do not consider the language of Article Seventh to be vague, doubtful or uncertain. The previously quoted provision expressly states that the majority of trustees may take "any action hereunder * * * provided that the corporate Trustee * * * shall be one of such majority." The only reasonable interpretation to which this language is susceptible is that a majority of the trustees could take effective trustee action only if the bank was one of that majority.

It is contended, however, that such an interpretation places Article Seventh in conflict with the earlier provisions devising the estate to charitable organizations "as may be selected by my trustees." This contention is untenable. Article Seventh is the only portion of the Stuart will in which effective trustee action is defined. The earlier dispositive articles provide only that the trustees shall select the charitable beneficiaries, and do not dictate the manner in which an effective selection is to be made. Thus the dispositive portions of the will cannot be considered to be in conflict with Article Seventh for the elementary reason that they do not pertain to the same subject matter.

Because the language of Article Seventh, when read either in isolation or in relation to the entire will, unambiguously and clearly requires that the corporate trustee be one of any majority of trustees, we cannot accept the argument that the provision only requires that the bank act as a tie breaker. Nor can we accept the contention raised by the Art Institute that the majority provision of Article Seventh applies solely to administrative rather than dispositive matters. The use of the expansive phrase "any action hereunder" is a clear indication that the testator intended the majority clause to apply to the entire will. The word "hereunder" is used several times in Article Seventh and each time is used in reference to the entire will and cannot reasonably be said to be limited to Article Seventh. We hold,

therefore, that the circuit and appellate courts correctly interpreted the will of Harold Stuart in this regard.

The Stuart sisters further contend that becasue the will provides no means to break a deadlock, the statutory policy of majority rule should apply. We do not agree. The statute involved provides only that majority rule shall apply "unless the instrument or authority creating the trust shall otherwise provide." (Ill. Rev. Stat. 1963, ch. 148, par. 33.) The statute thus does no more than to provide for majority rule when the instrument creating the trust is silent on that matter. Here, the will was not silent on the subject, and the fact that the will allows for the possibility of a deadlock is not a sufficient reason to disregard the expressed intention of the testator.

We next consider plaintiffs' contention that the circuit court erred in the manner in which it resolved the deadlock. As previously mentioned, the trial court essentially adopted the plan of distribution proposed by the bank and did not purport to create its own scheme of distribution. The trial court did, however, adopt the plan of the plaintiffs as to the distribution of the remainder of the trusts in which the Stuart sisters held life estates. The plaintiffs contend that that circuit court erred in failing to develop its own, independent plan of disposition once the court determined that a deadlock existed. Similarly, the plaintiffs contend that the bank's plan, which the circuit court adopted, was unreasonable and unsupported by the evidence. We do not consider that the trial court erred in failing to frame a wholly new scheme of distribution, nor do we consider that the entire plan of the bank was unsupported by the evidence.

Where trustees who are required to make discretionary decisions reach an irreconcilable difference of opinion, the deadlock must be resolved by the courts. (*Dingman* v. *Boyle* (1918), 285 Ill. 144.) Both sides of this contro ersy refer us to the Second Restatement for guidance and for a description of the procedure which a court of equity will follow when framing a



scheme of charitable distribution. Restatement (Second) of Trusts secs. 396, 397, 399 (1959).

Section 397 of the Restatement provides, in part, that "a disposition for charitable purposes will not fail because of the failure of the trustee to act or for want of a trustee." Comment *c* to section 397 refers to a situation similar to that involved in the present appeal.

> "Where the settlor leaves property for such charitable purposes as the trustee may select, and the trustee named is unable or unwilling to make the selection, and the settlor did not manifest an intention that the intended charitable trust should not arise or should not continue if the person named by him should not act as trustee, the court will either appoint a new trustee to make the selection or will frame a scheme for the application of the property. * * * [T]he court will frame a scheme for the application of the property, as it does in situations where a particular charitable purpose fails and the doctrine of cy pres is applicable. See sec. 399, comment *d*."

Thus, though the *cy pres* principle does not, strictly speaking, apply to a situation where co-trustees with the discretion to select charitable beneficiaries are unable to act, the court will be guided by the procedures which have been established under that doctrine.

Comment *d* to section 399 mentions certain factors the court will consider in framing a scheme of charitable distribution.

> "Under the circumstances stated in this Section, the court will direct the framing of a scheme to apply the trust property for some charitable purpose falling within the general charitable intention of the settlor. In framing a scheme the court will consider evidence as to what would probably have been the wish of the settlor at the time when he created the trust if he had realized that the particular purpose could not be carried out. The court will consider not only the language of the trust instrument, but also such circumstances as indicate what would have been the probable desires of the settlor, such as the character of the

> charitable gifts previously made by him, the charities in which he had expressed an interest, his religious affiliations, his views on social, economic and political questions, and the like."

The testimony of relatives of the donor may also be considered in order to indicate the types of charities in which the donor had been interested. G. Bogert, *Trusts and Trustees* sec. 442 (2d ed. 1964).

We feel that the above provisions of the Second Restatement of Trusts generally indicate the proper procedures and considerations to be applied to a situation like the present. When confronted with the deadlock between the Stuart sisters and the bank, it was incumbent upon the trial court to resolve the dispute by either appointing a new trustee or by framing a plan of distribution. We do not agree, however, with the plaintiffs' contention that the trial court committed reversible error merely because after hearing extensive evidence it chose to substantially adopt the plan advanced by the corporate trustee. We cannot ignore the unique nature of the situation with which the trial court was confronted. It must certainly be considered unusual for a testator to leave an estate in excess of $20 million to be distributed by his trustees to charity with no further guidance or direction. As the above-mentioned sections of the Second Restatement indicate, the primary duty of the court was to effectuate the probable charitable intent of the testator. The crucial issue is whether the evidence supports the conclusion that the court fulfilled this duty by ordering distribution pursuant to the plan which it did endorse. In determining this issue, the fundamental rule applies that the findings of a trier of fact will not be overturned unless contrary to the manifest weight of the evidence. *E.g.*, *Brown* v. *Commercial National Bank* (1969), 42 Ill. 2d 365.

Evidence was presented on behalf of the various charitable organizations suggested as recipients by the bank, specifying the nature of the charity, the persons served, its financial needs, etc.



In our view, there was ample evidence to support the trial court's selection of the charitable beneficiaries sponsored by the bank and to reject the scheme of distribution advanced by the sisters. The language of the Stuart will offers no indication as to the probable charitable intent of the testator. Indeed, the only conclusion that can be drawn from the language of the will is that the testator had no specific plan as to which charities would share in his estate. Though the testimony of Elizabeth Stuart was to the effect that Harold Stuart did in fact have a particular plan in mind, and that he had a "list" of charities he favored, the trial court was not bound to accept her testimony at face value. Her testimony was not entirely consistent, and its credibility was weakened by the fact that the testator failed to disclose the alleged "list" of charities to his corporate trustee and in fact had indicated to the bank that the choice of the beneficiaries was to be entirely discretionary with the trustees.

Additionally, evidence was presented which indicated that the bank had framed its plan of distribution in a manner designed to determine the probable charitable interests of Harold Stuart. The testator's business records and tax returns were studied for evidence of prior charitable donations. The testator's diary was read to learn of past contacts with charities and their representatives. And Harold Stuart's closest business contacts were interviewed to ascertain those charitable organizations in which he had shown an interest. In sum, competent evidence was introduced to indicate that the probable intent of Harold Stuart would have been to favor a broad-based distribution to the type of charities listed in the bank's plan.

There was thus competent and credible evidence to support the circuit court's decision, as the trier of fact, to endorse and accept the beneficiaries proposed by the bank. We hold, therefore, that the circuit court's decision to accept the beneficiaries proposed by the corporate trustee in preference to the smaller number of beneficiaries endorsed by the individual trustees was not against the manifest weight of the evidence. We also find,

however, that certain aspects of the overall plan adopted by the court, which relate to the amount of the particular distributions, are either not supported by the evidence or are erroneous as a matter of law.

We determine that the circuit court erred in its denial of the relief requested by plaintiff IIT in count III of the second amended complaint. In that count, IIT asserted a vested right to an additional $3.5 million of the estate. The facts relevant to this issue may be briefly restated. A formal "Statement of Intent" dated October 10, 1968, was signed by the Stuart sisters designating IIT to receive $8.5 million. Subsequently, $5 million was distributed to IIT, but the Stuart sisters never ceased their efforts to have that institution receive a greater amount. In a letter dated October 7, 1970, the bank designated IIT to receive an additional $3.5 million as part of a total plan of distribution. This letter read in pertinent part:

> "1. Increase the trust's present commitment to the Illinois Institute of Technology by an additional $3,500,000 (To be used for endowment and Chicago-Kent College of Law. This raises the total commitment to IIT to $8,500,000, the amount you originally suggested.)"

This letter was by coincidence drafted on the same date that IIT and the Stuart sisters filed their original complaint. In its answer to the complaint filed November 9, 1970, the bank reiterated this proposal, stating that "at the present time there is a disagreement among the trustees insofar as defendant proposes a total gift of $8.5 million to IIT while the individual trustees demand a grant to IIT equal to three-quarters of the available trust assets." The bank also prayed that the court direct distribution in accordance with its plan which included a total grant to IIT of $8.5 million. On June 15, 1971, the bank withdrew this proposal in a letter to the Stuart sisters. At the time of the sisters' final proposal of three-quarters of the estate to IIT, the bank had advised the sisters that approximately $9 million would be available for distribution.



Article Fifth of Harold Stuart's will provided that if the trust could not be distributed within 5 years the executors were to select the charitable beneficiaries in writing prior to the expiration of that period of time. Article Fifth further provided that the interests of the selected charities would vest at the end of the 5-year period. IIT contends that the sisters' "Statement of Intent" of October 10, 1968, and the bank's letter of October 7, 1970, constitute a written designation of IIT as the beneficiary of an $8.5 million grant. The appellate court rejected this argument, reasoning that there had been no simultaneous selection of IIT to receive $8.5 million, and that there was no "meeting of the minds" because the sisters had designated IIT for three-quarters of the estate. 43 Ill. App. 3d 169, 198-99.

We initially note that resolution of this issue does not call for a resort to the niceties of contract law rules concerning offer and acceptance. It is apparent from the record before us that all three trustees had designated IIT as the recipient of at least $8.5 million by the time this unfortunate controversy reached the courts. As its own pleadings indicate, at the time the suit was filed the bank proposed an $8.5 million grant to IIT. The only disagreement stemmed from the fact that at that time the Stuart sisters had designated IIT to receive three-quarters of the available estate. The bank's decision to withdraw its proposal for an additional grant to IIT did not occur until some time after this litigation had commenced.

Our review of the record leads us to the inescapable conclusion that the bank withdrew its earlier proposal because of the then pending litigation and because the Stuart sisters would not endorse its total plan of distribution. The testimony of the bank officer charged with the overall supervision of the trust reveals no reason for the bank's withdrawal of the additional grant to IIT except that it was precipitated by the sisters' refusal to assent to the bank's total demands. Additionally, the bank officer could not recall the reason that certain of the other grants had been raised after the additional $3.5 million to IIT was withdrawn.

These increased grants, together with several new gifts, were roughly comprised of the amount previously earmarked for IIT. In short, no evidence was offered to support the reduction in IIT's designation.

From the record before us, we can only determine that the bank's withdrawal of its proposal for an additional grant to IIT was arbitrary and unreasonable. The trustees had, in effect, all proposed that $8.5 million was the minimum amount IIT should receive. The trial court should have accepted this figure as an amount over which the trustees had reached agreement, as was specifically stated in the bank's pleadings. Because there was no evidence to suggest that the amount of this grant subsequently became unreasonable or inappropriate, the circuit court erred in failing to find for IIT as to count III. We hold, therefore, that upon remand an order be entered directing that an additional $3.5 million of the estate be distributed to IIT.

We next consider whether the evidence supports a total grant of $1 million to the Chicago Historical Society. The Chicago Historical Society was listed as a beneficiary in the plan of distribution submitted by the bank. The amount of the gift was $500,000. The society was also listed by the Stuart sisters as a beneficiary of $500,000 of the remainder interest in the trust estates created for them. As mentioned, the bank submitted no plan to dispose of the remainder interests in the sisters' life estates. Neither the bank nor the sisters proposed to the court that the Chicago Historical Society should receive a gift of $1 million. Yet, the effect of approving the designations by the sisters as to the charities to take from the remainders of their life estate trusts, while adopting the bank's plan for the distribution of the rest of the estate, was that the circuit court awarded the Chicago Historical Society a total of $1 million.

It is contended that this is an inadvertent duplication. We find that it is not. Prior to the entry of the judgment order in the circuit court, IIT, the Stuart sisters, and the Museum of Science and Industry objected to the proposed decree and



requested certain modifications. The Stuart sisters specifically pointed out that the effect of the court's proposed ruling would be to give ot the Chicago Historical Society $500,000 from the remainder of the sisters' trust and $500,000 from the other trust funds available for distribution by the trustees, making a total gift to that charity of $1 million. The sisters urged in their objection that it was not their intent that the Chicago Historical Society should receive a total gift from all funds of more than $500,000. The court nonetheless, in entering its final order of distribution, provided that the Chicago Historical Society should receive $500,000 through the distribution plans submitted by the bank (which did not purport to distribute the remainder of the sisters' trusts), and it also approved the plan submitted by the sisters in count IV for the distribution of the remainder of the sisters' trusts, which plan provided for an additional $500,000 to this charity. This clearly is not an oversight on the part of the court or a case of inadvertence. There were two separate funds involved in the litigation. The bank never proposed to participate in the distribution of the remainder of the sisters' trusts and denied that the court should order any distribution of this remainder as prayed by IIT in count IV. The plan the bank submitted in its answer to count II involved a distribution from the other funds which the will directed be set over to charity after the two $1 million trust funds had been established for the sisters. We do not find the two separate distributions from the two separate funds as ordered by the court to be contrary to the manifest weight of the evidence.

The Museum of Science and Industry, an intervenor, contends that the trial court's judgment is against the manifest weight of the evidence in that the museum is limited to a gift of $50,000, and, as a group 3 charity under the bank's plan, is prevented from sharing in the residual amount of the estate. The museum contends that, due to its size and the extent of its operations, it should be classified as a group 1 charity under the bank's approved plan rather than as a group 3 charity. Evidence was

introduced to demonstrate that the museum is a far more sizeable institution than the other charities which comprise group 3.

Although the evidence shows that the Museum of Science and Industry is similar in many respects to some institutions listed as group 1 charities, we cannot find that the listing of this institution as a group 3 charity is against the manifest weight of the evidence. The record reflects that the testator had visited the museum a limited number of times and had only a limited contact with a general interest in this institution.

We next consider plaintiffs' contentions in regard to the allocation of the $6.5 million of funds in excess of the specific dollar amount of the court-approved plan. Plaintiffs contend that we should, at the least, direct that the circuit court conduct new proceedings and frame a scheme of distribution for the additional funds. Under the particular facts of the case, we find no reason to do so.

Under the court-approved plan, charities listed under groups 1 and 2 are to share in the excess funds on a *pro rata* basis. We find this aspect of the plan to be supported by the evidence. With the exception of the Museum of Science and Industry, only smaller charities with minimal contact with testator's sphere of interest were included in group 3. IIT is the only other charity which is precluded from taking a *pro rata* share of the excess funds, and the court could well have concluded that IIT's share of the estate was already of sufficient size. We cannot say that the circuit court's adoption of this aspect of the bank's plan is inequitable or contrary to the manifest weight of the evidence.

We finally consider whether the court awarded excessive or unwarranted attorneys' fees and trustees fees to the Stuart sisters. This issue is raised by a number of the charitable intervenors. The circuit court granted specific fees to the sisters and their attorneys following a special hearing on the matter, and the appellate court affirmed.



The facts relevant to this issue are fully stated in the opinion of the appellate court. (43 Ill. App. 3d 169, 202-03.) We shall restate only those facts deemed necessary to an understanding of our disposition of this issue. Intervenors basically contend that the Stuart sisters had no authority to employ counsel or to charge the trust estate for such fees. It is also alleged that the attorneys' services were performed for the benefit of IIT rather than the sisters, and, thus, are not chargeable to the estate. We do not agree and therefore affirm the judgments of the circuit and appellate courts.

The determination of the need for attorneys' fees and the amount of such fees is a decision which rests in the discretion of the trial court. (*Ingraham* v. *Ingraham* (1897), 169 Ill. 432, 471-72.) The trial court did not abuse its discretion by finding that the Stuart sisters justifiably retained counsel and commenced the present litigation. The trustees were hopelessly deadlocked over the manner in which they should discharge their duties as trustees, and resort to the courts was necessary to resolve the impasse. Where, as here, the litigation is the result of honest differences of opinion, attorneys' fees and litigation expenses will be chargeable to the estate. (*Orme* v. *Northern Trust Co.* (1962), 25 Ill. 2d 151, 165.) We hold that the trial court did not abuse its discretion by charging attorneys' fees and expenses incurred by the Stuart sisters to the estate or by approving the payment of trustee fees to the individual co-trustees.

Nor do we accept the intervenors' contention that the estate was charged for services performed on behalf of IIT. This contention stems from the fact that the same attorney represented both IIT and the Stuart sisters for a period of approximately 2 years. The attorney withdrew as counsel for IIT before the actual trial of the case. As the appellate court noted, the trial judge was aware of this period of dual representation and suggested that the fees be distributed between the sisters and IIT. Thereafter, a substantial reduction in the requested fees was made. We, therefore, hold that the trial court did not abuse its

discretion in regard to the allocation of the fees and expenses incident to this litigation.

The judgments of the circuit court of Cook County and of the appellate court are affirmed in part and reversed in part, and the cause is remanded for modifications and further proceedings consistent with this opinion.

*Affirmed in part and reversed*
*in part and remanded*
*with directions.*